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No. 84-335 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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8pp

TABLE OF AUTHORITIES

Page

Cases:

Butz v. *Economou*, 438 U.S. 478 4

Ellsberg v. *Mitchell*, Civ. No. 1879-72 (D.D.C. July 22, 1983) 4

Halperin v. *Kissinger*, 578 F. Supp. 231 4

Harlow v. *Fitzgerald*, 457 U.S. 800 ..... 2, 3, 4

Imbler v. *Pachtman*, 424 U.S. 409 5

Katz v. *United States*, 389 U.S. 347 2

Smith v. *Nixon*, 582 F. Supp. 709 3-4

United States v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) 3

United States v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970) 3

United States v. *United States District Court*, 444 F.2d 651, aff'd, 407 U.S. 297 ..... 2, 3

Zweibon v. *Mitchell*, 720 F.2d 162, cert. denied, No. 83-2005, (Oct. 9, 1984) 2, 3

Statute:

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C 2510-2520 2

18 U.S.C. (1976 ed.) 2511(3) 2

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1. Respondent has offered no serious reasons why this Court should not resolve the question whether the denial of a qualified immunity claim in a *Bivens* suit is immediately appealable under the collateral order doctrine. On the contrary, he concedes (Br. in Opp. 6 n.2) that there is a conflict in the circuits on this question[1], and he does not dispute the practical importance of this issue. Indeed, by claiming that a "qualified immunity defense * * * is * * * asserted by virtually every defendant in civil rights cases" (Br. in Opp. 4), respondent dramatizes the need for prompt review by this Court.

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[1]In addition to the cases cited in the petition at 9 & n.6, see *England* v. *Rockefeller*, Nos. 83-1851 (L), 83-1852, 83-1853, 83-1854 (4th Cir. July 16, 1984).

Respondent argues (Br. in Opp. 6) that this is not an appropriate case for considering the question because the only remaining issue in the case is damages and therefore an interlocutory appeal will not save any trial time. However, as the court of appeals noted (Pet. App. 34a), resolution of respondent's request for punitive damages may involve an "inquiry into the circumstances surrounding the defendant's activities, his subjective intent, and the presence or absence of malice" that would be "as searching as the trial on the merits would have been." Moreover, if the issue of appealability is not promptly resolved, trial time may be wasted in other cases.[2]

2. Respondent attempts to show (Br. in Opp. 7-10) that the illegality of warrantless domestic national security electronic surveillance was clearly established at the time of the wiretaps in question here, which antedated *United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972). But respondent understandably ignores this Court's unequivocal recognition in *Keith*, 407 U.S. at 299, 309, that it was confronting this issue "for the first time" in that case and that the issue previously had been "left open by *Katz* [v. *United States*, 389 U.S. 347, 358 n.23 (1967)]."[3] Respondent

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[2]Respondent also argues (Br. in Opp. 6) that review is inappropriate because this case involves a claim for damages under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, which is not subject to interlocutory review. This Court, however, already has ruled that Title III "simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972); see also 18 U.S.C.(1976 ed.) 2511(3); see also the discussion of this issue in the Brief for the Respondent at 17-18, in *Zweibon* v. *Mitchell*, cert. denied, No. 83-2005 (Oct. 9, 1984).

[3]Because *Keith* itself involved a *domestic* security surveillance, these statements by the Court necessarily are dispositive of respondent's attempt by "polling" individual Justices of the Court on the basis of their separate opinions in different cases, to show that *Katz*, at best reserved decision on the question of the lawfulness of warrantless

likewise ignores the inconvenient fact that at the time of the wiretaps at issue here, the only two federal courts that had considered the constitutionality of warrantless domestic security surveillances had both found them to be within the President's authority. See *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), cited at Pet. App. 23a.[4]

Finally, respondent ignores the substantial and (except for the decision in this case, unanimous) lower court authority holding in cases involving petitioner that the illegality of warrantless domestic national security wiretaps was not clearly established or even foreshadowed at the time relevant here.[5] See cases cited Pet. 14; see also *Smith* v. *Nixon*,

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foreign national security surveillances (see Br. in Opp. 8-9). See also *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162, 172 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984) (noting with regard to a similar argument: "Even ignoring the inherent difficulties and imprecision that must attend any 'vote' based on statements made in other decisional contexts, appellants' 'poll' proves nothing, since it applies a different test from that expounded in *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]. The test for qualified immunity is 'clearly established,' not 'clearly foreshadowed.' The distinction is self-evident.").

[4]In arguing that "petitioner [cannot] draw support from district court rulings," respondent inexplicably ignores the *O'Neal* and *Dellinger* decisions and instead cites two other decisions, which respondent then distinguishes on the ground that they involved foreign security surveillances (see Br. in Opp. 9). Even this distinction is not well founded, however, since, prior to *Keith*, decisions sustaining the President's electronic surveillance authority in the foreign security area reasonably were perceived as providing support for the exercise of similar authority in situations involving threats to domestic security. See, *e.g.*, *United States* v. *United States District Court*, 444 F.2d 651, 674-676 (6th Cir. 1971) (Weick, J., dissenting), aff'd, 407 U.S. 297 (1972).

[5]Respondent selectively cites (Br. in Opp. 9-10) just one of the diverse memoranda petitioner received as Attorney General on the constitutional questions involved in national security wiretaps. However, as the court of appeals in *Zweibon IV* noted with respect to a similar argument (720 F.2d at 171):

582 F. Supp. 709 (D.D.C. 1984); *Halperin* v. *Kissinger*, 578 F. Supp. 231 (D.D.C. 1984); *Ellsberg* v. *Mitchell*, Civ. No. 1879-72 (D.D.C. July 22, 1983). How many more times must petitioner litigate this precise question?

3. Respondent's brief in opposition also ignores what is most relevant in addressing the issue of absolute immunity. This Court has already stated that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interests." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982) (footnote omitted). The importance of this question seems manifest, and respondent has not provided a single reason why it should not be reviewed here.

Respondent argues (Br. in Opp. 11) that petitioner's claim is "undifferentiated." On the contrary, however, it is quite specifically restricted to decisions in the field on national security and foreign policy.

Respondent contends (Br. in Opp. 11) that the Attorney General has absolute immunity only when he acts in a "quasi-judicial" capacity. But while this Court has held that Cabinet officers do not enjoy absolute immunity for all of their actions (*Butz* v. *Economou*, 438 U.S. 478 (1978)), the

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> [O]ur reading of the internal memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance.

Perhaps more importantly, respondent's citation to such materials illustrates how requiring discovery and testimony of "an official's professional colleagues" can chill the exchange of candid views within a department and "be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817 (footnotes omitted).

Court has never held that the Attorney General's absolute immunity is limited to his quasi-judicial functions.

Respondent objects to absolute immunity (Br. in Opp. 11) because the potential for personal liability deters illegality. However, assuming that absolute immunity is not to be eliminated entirely, respondent's general objection does not speak to the question relevant here, *i.e.*, whether in the sensitive area of national security and foreign policy, the adverse effects of personal damages actions justify whatever beneficial deterrence such suits may have.[6]

Respondent closes (Br. in Opp. 12) with the extraordinary claim that "*Keith* * * * by its explicit terms forecloses the claim to absolute immunity." It suffices to say that *Keith*, a criminal case, no more settled the absolute immunity issue than the pre-*Keith* decisions clearly established the illegality of the wiretaps in this case.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

OCTOBER 1984

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[6]Needless to say, there are other deterrents against official misconduct, including dismissal, impeachment, criminal prosecution, congressional inquiry and oversight, and, in the case of the Attorney General, professional discipline. See *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976).